Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

CHARLES E. NICHOLSON;
JOHN W. SMITH,

Petitioners,

v.

WORLD BUSINESS NETWORK, INC.;
WORLD CHARITIES, INC.;
WORLD LOTTERY SERVICES;
EDWARD M. PEABODY; N.D. MCCULLAR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether the Court of Appeals may invalidate the Secretary of Labor's interpretation of Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, et seq., and the plain meaning of the related regulations, purportedly relying on congressional intent and contrary to the Court's holding in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984).

B. Whether, under the FLSA, where petitioner-employees did not receive any payment of compensation, respondent-employers' mere promise to pay employees a salary in excess of $250 per week satisfied the salary-basis test for the administrative exemption at 29 C.F.R. § 541.2.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE

Nicholson v. World Business Network, Inc., et al., 105 F.3d 1361 (11th Cir. 1997)

STATEMENT OF JURISDICTION

1. The judgment sought to be reviewed was entered by the United States Court of Appeals for the Eleventh Circuit on February 18, 1997.

2. The United States Court of Appeals for the Eleventh Circuit denied Petition for Rehearing on May 27, 1997.

3. The statutory provision conferring jurisdiction on the Supreme Court of the United States in this case is 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

29 C.F.R. § 541.118(a).

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his

full salary for any week in which he performs any work without regard to the number of days or hours worked.

29 U.S.C. § 213.

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements. The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 [29 U.S.C. §§ 206, 207] shall not apply to –

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act except than [that] an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours

worked in the workweek are devoted to such activities).

29 C.F.R. § 541.2.

§ 541.2 Administrative

The term *employee employed in a bona fide***administrative***capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department, or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in this case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week ($130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week ($200 per week if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

STATEMENT OF THE CASE

1. Material Facts

The undisputed facts are that petitioner John Smith was employed beginning in early February 1993 to supervise the printing of lottery tickets. On February 26, 1993, after he completed approximately two weeks' work in the United States, he traveled to Moscow on behalf of his employer, returning to the United States on or about March 23, 1993. Respondents do not dispute the fact that John Smith was never paid for any of his work during the entire period of his employment, nor that the corporate defendants (parties to the original suit in the district court) failed to reimburse him for approximately $2,000 in expenses he incurred on their behalf. It is also undisputed that respondents' business continued to operate during this period and that other employees who continued to work through this period were paid. John Smith had been promised compensation at the rate of $2,000 per week. He received nothing.

Petitioner Nicholson was employed from May 12, 1993 through August 11, 1993 without receiving any compensation. During the period in question, Nicholson worked as a "trader" with WL Trading, the arm of respondents' business designed to identify and consummate barter and countertrade deals. The employment agreement between Nicholson and respondents provided that Nicholson would receive $5,000 per month and a bonus of $30,000 at the end of six months. He was not paid for any work during this period and did not receive the promised bonus. Respondents continued in business

after Nicholson's employment ended and continued to pay other employees.

By decision dated February 18, 1997, the United States Court of Appeals for the Eleventh Circuit affirmed a judgment in favor of respondents as to petitioners' claims under the Fair Labor Standards Act in the above-styled case. For reasons set forth below, including a decision of the United States Supreme Court handed down one day after the Court of Appeals decision was published, petitioners respectfully petition this honorable Court for a writ of certiorari.

2. Basis For Federal Jurisdiction In The Court Of First Instance

Jurisdiction in this action was conferred on the United States District Court for the Northern District of Georgia by 29 U.S.C. § 216(b) and by the provisions of 28 U.S.C. § 1337 relating to "any civil action or proceeding arising under any Act of Congress regulating commerce."

ARGUMENT AND AUTHORITIES

A. Because Congress Specifically Entrusts The Interpretation Of The FLSA To The Secretary Of Labor, The Secretary's Interpretation Must Be Upheld, So Long As It Is Not Plainly Erroneous Or Inconsistent With The Regulation.

In this case, the decision of the Court of Appeals for the Eleventh Circuit, applying the FLSA administrative exemption to petitioner-employees, who received no

compensation, conflicts the Secretary of Labor's regulations and with relevant decisions of the Supreme Court. As with the Court's recent decision in *Auer v. Robbins*, ___ U.S. ___, 117 S.Ct. 905, 1997 U.S. Lexis 1272 (U.S. 1997), "[t]his case presents the question whether the Secretary of Labor's 'salary-basis' test for determining an employee's exempt status reflects a permissible reading of the [FLSA]. . . . " *Id.* at *4-5. If the Secretary's interpretation is "permissible," it controls the application of the Act by the federal courts. *Id.* at *15 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835 (1989)).

1. Supreme Court Jurisprudence And Principles Of Administrative Law Dictate That The Federal Courts Defer To Agency Regulations In Interpreting And Applying The FLSA.

The growth of the administrative state and the realities of the evolving workplace, *inter alia*, require that Congress be permitted to legislate in broad terms, vesting the power in executive agency officials to make practical "gap-filling" decisions to implement that legislation. *Touby v. United States*, 500 U.S. 160, 165, 111 S.Ct. 1752, 1756 (1991); *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575 (1947). In other words, once Congress has made the central social choice through legislation, it may assign authority to an agency to fill in the interstices of that broader policy decision. Administrative regulations interpreting the corresponding legislation are a common outgrowth of such delegated authority. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43,

104 S. Ct. 2778, 2781-82, 81 L. Ed.2d 694 (1984), the Supreme Court defined the level of deference due to these agency regulations. The Court stated that if Congress has directly spoken to a precise question and the intent of Congress is clear, "the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* If the "statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 102 S. Ct. at 2782.

In the instant case, as explained by the Court in *Auer, supra*, at *7, Congress expressly delegated the authority to define the FLSA administrative exemption to the Secretary of Labor. 29 U.S.C. § 213(a)(1). The regulation, which must be given the force and effect of law, requires that the employee be "compensated for his services on a salary or fee basis of not less than $155 per week [(long test)] or $250 per week [(short test)]. . . . " 29 C.F.R. §§ 541.2(e)(1), (2). The correlative interpretative bulletin states unequivocally that:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he *regularly receives each pay period* on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reductions because of variations in the quality or quantity of work performed. Subject to the exception provided below, *the employee must receive his full salary* for any week in which he performs work

> without regard to the number of days or hours worked.

29 C.F.R. § 541.118(a) (emphasis added). In definitive terms, 29 C.F.R. § 541.118 requires that the employee "receive his full salary" and not merely that he receive a promise of a salary.

Decisions of the Supreme Court require that the courts defer to the Secretary of Labor's reasonable interpretation, unless a variance is justified by a very good reason. *Auer, supra; Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944). The district court in this case failed to articulate a justification for contradicting the Secretary's interpretation, to allow an entirely unpaid employee to qualify for an administrative exemption, while other employees were, in fact, compensated. On appeal, the Eleventh Circuit expressly acknowledged that the plain meaning of the regulations require the actual payment of a salary. "As Nicholson and Smith point out, an administrative employee is one who 'is compensated' – a passive verb in the past tense that suggests an action completed, i.e., that the employee has actually been paid." *Nicholson*, 105 F.3d 1361, 1365 (11th Cir. 1997). In turn, contradicting this clear, common understanding, Supreme Court jurisprudence and administrative law, the Court of Appeals summarily opined that "[m]ore decisive is Congressional intent," and affirmed the lower court's ruling. *Id.* The preference for a divination of intent over plain language is in direct conflict with the Supreme Court's handling of the identical section of the regulations, 29 C.F.R. § 541.118, in *Auer*. The Supreme Court explicitly stated that "[b]ecause the salary basis test is a

creature of the Secretary's own regulation, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.' " *Auer, supra,* at *15 (citation omitted).

2. Due Regard Must Be Given To The Plain Meaning Of The Word "Compensated."

The Supreme Court has repeatedly instructed that the language of a statute is to be given its natural and normal meaning. Where words are unambiguous, the quest for intent is inappropriate, and where Congress has deferred to an agency to enact regulations, the agency's interpretation must be sustained so long as it is based on a permissible construction of the statute. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1987); *Rust v. Sullivan,* 500 U.S. 173, 111 S. Ct. 1759 (1991) (Secretary's construction may not be disturbed if it reflects a plausible construction of the plain language of the statute and otherwise does not conflict with congressional intent); *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 110 S. Ct. 1570 (1990); *Auer, supra,* at *10 ("Because the FLSA entrusts matters of judgment such as this to the Secretary, not the federal courts, we cannot say that the disciplinary-deduction rule is invalid as applied to law-enforcement personnel.").

In this case, the plain meaning of the provision is readily ascertainable from the clear and express terms of 29 C.F.R. § 541.118(a). In addition, Webster's New World Dictionary, (2d ed. 1980) further defines "compensation" as "payment for services; esp., wages or remuneration." In other words, the plain meaning of "compensated for

his services" is that the employee must be *paid*, not merely promised payment, and the Eleventh Circuit so acknowledged.

As the simple clarity of the language and grammar of the regulation itself and the above dictionary definition logically dictate the required meaning that an employee actually receive payment of compensation, so too does the fact that Congress expressly vested in the Secretary of Labor the power to interpret the relevant provision. 29 U.S.C. § 213(a)(1). Effectuating legislation by this means is "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372, 109 S.Ct. 647, 655 (1989). "Practical" is the operative word regarding the plain meaning of the FLSA. That is, when the law must be responsive to the realities of a particular situation or industry, Congress and the Supreme Court defer to the judgment of administrative experts in that field, giving realistic meaning to the terms of legislation. Along this vein, the Supreme Court's decision in *Auer* and the Eleventh Circuit Court of Appeals' own decision in *Atlanta Professional Firefighters Union, Local 134 v. Atlanta*, 920 F.2d 800 (11th Cir. 1991), direct that whether an employee receives the statutory amount, thus qualifying for the exemption, is determined by "actual practice." *Auer, supra*, at *15. The reality in this case is the petitioners were never paid. The lower courts impermissibly attributed to the meaning of "paid," the mere possibility of payment, as opposed to requiring that compensation be actually received. This contradicts both the plain

meaning of the language of the FLSA and the practical realities of the employer-employee relationship underlying the Act, as a whole.

B. Because Petitioner-Employees Did Not Receive Any Payment Of Compensation, The Lower Courts Incorrectly Applied The Salary-Basis Prong Of The Administrative Employee Exemption Of The FLSA.

The Supreme Court's decisions in *Chevron* and *Auer* demonstrate that the courts are not free to substitute their judgment for that of the Secretary of Labor. The salary test of the administrative exemption is very specific. Once Congress delegated responsibility for enacting regulations to the Secretary of Labor, courts must look to those regulations, and not the intent of Congress, for guidance.

After explaining the above obligation of courts to defer to the interpretation, as evidenced by regulations and interpretive bulletin, issued by the Secretary of Labor, the Supreme Court explained the salary basis test as follows:

> Under the Secretary's chosen approach, exempt status requires that the employee *be paid on a salary basis*, which in turn requires that his compensation not be subject to reduction because of variations in the 'quality or quantity of the work performed.' 29 C.F.R. § 541.118(a) (1996).

Auer, supra, at *7 (emphasis added).

In this case, the lower court found that because petitioners' salaries were not subject to variation because of the quality or quantity of work, the salaries did not have to be paid, but only promised, for the test to be satisfied.

In contrast, the Supreme Court in *Auer* instructs that the relevant inquiry is whether the exemption may still be lost because the pay "as a practical matter" was subject to adjustment in a manner inconsistent with the test. *Auer, supra,* at *14. "Actual practice" or "significant likelihood" of diminished payment are pertinent to qualifying for exempt status. Policies or promises of deductions, in themselves, because they do not actually affect the salary received by an employee, are not relevant to the salary-basis test analysis. *Id.* at *12-15. The Court of Appeals, below, appeared to recognize this principle, noting that "an administrative employee is one who 'is compensated' – a passive verb in the past tense that suggests an action completed, i.e., that the employee has actually been paid." *Nicholson,* 105 F.3d at 1365. Inexplicably and contrary to well-established law, the Court of Appeals dismissed that plain meaning and its requirement that the monies in fact received by an employee equal or exceed the amount specified in the regulation. Instead, the Eleventh Circuit held that an unsubstantiated "theoretical possibility" of payment of salaries comports with the administrative exemption requirement and to purported "Congressional intent." Again, *Auer* is directly analogous to the petitioners' case. In *Auer,* the Court denounced the impact of a "theoretical possibility" of salary deductions on an employee's exempt status. ___ U.S. ___, 117 S.Ct. 905, 1997 U.S. Lexis 1272, *12.

In addition to disregarding the requirements of this "reality" test, the district court and the Court of Appeals, below, further erred in construing the exemption in a manner inconsistent with its plain language and long-standing Agency regulations. Because the FLSA is a

remedial statute, exceptions are narrowly construed. The Supreme Court has held:

> Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the interest of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

A.H. Phillips, Inc. v. Walling, 324 U.S. 491, 493, 65 S. Ct. 807, 89 L. Ed. 1095 (1945); *SEIU Local 102*, 60 F.3d at 1350, *quoting Abshire*, 908 F.2d at 485-86.

Consistent with the courts' emphasis on plain meaning and the practical realities of the employer-employee relationship, it defies logic to otherwise interpret the FLSA to allow employers, who refuse to pay their employees, to be sheltered by provisions based on the payment of certain salaries. The obvious resultant risk is that unscrupulous employers may invoke this decision of the Eleventh Circuit to evade liability for wages by claiming that if they have an executory contract with a salaried employee they are immune to any action under the FLSA.

Precedent compels the conclusion that the mere promise to pay a salary in excess of $250 per week, as theoretical employer policy, may not be substituted for the actual salary paid. In the language of the Court's decision in *Auer*, petitioners Nicholson and John Smith were "actually vulnerable" and subject to "actual deductions" of the entire amount of their purported salaries. ___ U.S. ___, 117 S.Ct. 905, 1997 U.S. Lexis 1272, *12-14. As

such, the undisputed amount petitioner-employees were "compensated for [their] services" (29 C.F.R. § 541.2(e)) is $0. The amount required by 29 C.F.R. § 541.2(e)(2) to qualify for the administrative exemption is $250 per week. Respondents are at the very least $250 payments shy of shelter from the rigors of the FLSA.

Respectfully submitted,

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Charles E. NICHOLSON, John W. Smith, Plaintiffs-Appellants,

v.

WORLD BUSINESS NETWORK, INC.; World Charities, Inc.; World Lottery Services; Edward M. Peabody; N.D. McCullar, Defendants-Appellees.

No. 95-9575.

United States Court of Appeals,
Eleventh Circuit.

Feb. 18, 1997.

Two former employees brought breach of contract and Fair Labor Standards Act (FLSA) claims against former employer and executives for former employer seeking to recover unpaid salary. The United States District Court for the Northern District of Georgia, No. 1:93-CV-2328-WBH, Willis B. Hunt, Jr., J., entered judgment for defendants on FLSA claims. Employees appealed. The Court of Appeals, Cudahy, Senior Circuit Judge, sitting by designation, held that: (1) determination of employees' salary basis for purposes of showing whether employees were administrative employees exempt from coverage within meaning of FLSA is based on salary that employees were owed under their employment contracts and not on compensation that employees actually received, and (2) evidence supported special verdict finding that employee was administrative employee exempt from coverage under FLSA.

Affirmed.

Appeal from the United States District Court for the Northern District of Georgia.

Before ANDERSON and CARNES, Circuit Judges, and CUDAHY*, Senior Circuit Judge.

CUDAHY, Senior Circuit Judge.

If an employer fails to pay managerial employees the salary owed them, can the employees not only assert breach of contract but also invoke federal labor law? Charles Nicholson and John Smith, the plaintiff-appellants, argue that they can.

Employees with the kind of jobs that Nicholson and Smith had cannot generally look to the Fair Labor Standards Act (FLSA) for protection, for the FLSA does not apply to "administrative employees" – a category that includes lower-than-top tier managerial staff. The district court concluded on summary judgment that Smith was an administrative employee, and a jury by special verdict found the same for Nicholson.

Nicholson and Smith claim that the district court erred, and that as a matter of law, they cannot be administrative employees. One criterion for an employee's falling into the class of "administrative employees" is a weekly salary of $250 or more. Nicholson and Smith claim that because they never received a dime, they cannot be administrative employees, and, therefore, the bar to their relying on the FLSA drops away. This is an

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* Honorable Richard D. Cudahy, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

unusual interpretation of the FLSA, one that would convert an entire category of state contract law actions into federal labor suits. Because Congress did not intend such a result for well-compensated, highly responsible positions, we reject the proffered interpretation.

Plaintiffs raise two other issues. The first is whether there is no evidence to support the jury's special verdict against Nicholson. The second is whether defendant N.D. McCullar was an employer under the FLSA. The first issue we dispose of quickly, and the second evaporates with our rejection of the "administrative employee" claims. We affirm.

I. A Russian imbroglio

Defendants McCullar and Edward Peabody served in a variety of executive roles for a web of companies including World Business Network, Inc., World Charities, Inc. and World Lottery Services, Inc. The precise details of the web's structure are inconsequential, because the companies suffered a default judgment and only McCullar and Peabody remain as defendants on appeal. What is consequential is that this web of companies collaborated with Gil Bachman (not a party to this suit) to create private lotteries in the former Soviet Union. With claimed expertise in lottery operations, Bachman served as point man for defendants McCullar and Peabody in their dealings with plaintiffs Nicholson and Smith.

Plaintiff Smith had worked on lotteries with Bachman before. Then, in November 1992, Bachman convinced Smith to help on the lottery enterprise in the former Soviet Union. Smith was to travel to Russia for

five to six weeks at a salary of $2000 per week. Smith took care of some initial business in America for a week and a half, and then departed on February 26, 1993. He stayed in Russia until March 20. While there, Smith performed spadework for the lottery business: he established a security system, organized tickets and prizes and inspected operations. Sometime near the end of Smith's stay, Bachman flew to Russia and fired him. Smith was never paid. He filed suit on October 13, 1993 against the web of companies and McCullar and Peabody, alleging breach of contract and violation of the FLSA. On the FLSA claim, he sought unpaid minimum wages, overtime compensation, an equal amount in liquidated damages and attorneys' fees, as 29 U.S.C. § 216(b) provides. Because the FLSA does not apply to work performed in a foreign country, 29 U.S.C. § 213(f), Smith's damages would be confined to the salary he earned before departing for Russia.

Plaintiff Nicholson did his work entirely in the United States. Like Smith, Nicholson's relationship with Bachman antedated these dealings. In February 1993, Nicholson began his employ as a recruiter for Bachman's and defendants' Russian enterprise, for which he was paid $5,000 per month. A few months later, Nicholson moved beyond recruiting to some participation in sales and trading. Nicholson says he was never paid for this sales and trading work. Nicholson filed suit in tandem with Smith on October 13, 1993, making the same allegations: that the companies had breached their contract with Nicholson, and that all the defendants had violated the FLSA.

Defendants filed a motion for summary judgment against both plaintiffs. On the FLSA claims, the district

court refused to rule on whether Smith and Nicholson were employees or independent contractors (contractor status would have exempted them from the FLSA). The district court then assumed arguendo that Nicholson and Smith were employees, and turned to defendants' next affirmative defense: that Smith and Nicholson fell outside the FLSA's ambit as "administrative employees," a term we examine in the next section (II). The district court decided that the defendants had proven that Smith fell into that class, but the facts of Nicholson's employment were inconclusive. The suit proceeded to trial, whereupon a jury returned a special verdict holding that Nicholson was an employee – but an administrative employee.

Meanwhile the companies had stopped representing themselves in the lawsuit, presumably because they had been emptied of cash and other assets. The district court entered a default judgment against them for breach of contract. But, because the district court had earlier held that defendants McCullar and Peabody were not personally liable for the contract claim, the default judgment, against moneyless companies, amounted to a hollow victory for Nicholson and Smith.

After the special verdict on the FLSA claim, Nicholson filed a motion for judgment as a matter of law or, in the alternative, for a new trial. His argument was the same claim that he and Smith present on appeal: that they could not have been administrative employees as a matter of law. The district court denied the motion. Reviewing a question of law like this one *de novo, Reich v. Davis,* 50 F.3d 962, 964 (11th Cir.1995), we now turn to whether the district court denied the motion properly.

II. Were Nicholson and Smith administrative employees?

When Congress passed the FLSA almost sixty years ago, it sought to end the presence in American commerce of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). The levers Congress chose were a minimum wage, mandatory overtime pay and curbs on child labor. 29 U.S.C. §§ 206, 207, 212. As the Supreme Court observed in 1945, the "Act seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation." *Roland Electrical Co. v. Walling*, 326 U.S. 657, 669-70, 66 S.Ct. 418, 419, 90 L.Ed. 383 (1946).

The goal of ameliorating the uglier side of a modern economy did not imply that all workers were equally needful of protection. The chief financial officer of a company, for instance, would be less likely to be exploited than a janitor or assembly linesman. So Congress removed "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman" from the FLSA's strictures. 29 U.S.C. § 213(a)(1). Congress delegated authority to the Secretary of Labor to define these terms.

The implementing regulations create two tests, the long and the short, for whether a person is an "administrative employee." 29 C.F.R. § 541.2. The long test includes five parts, all of which the employee's job must satisfy. The first four parts hone in on what kind of work the employee does:

(1) Is the employee's primary duty "office or non-manual work directly related to management policies or general business operations"?

(2) Does the employee "customarily and regularly exercise[ ] discretion and independent judgment"?

(3) Does she "regularly and directly assist[ ] a proprietor, or an employee employed in a bona fide executive or administrative capacity," *or* does she "perform [specialized or technical work] under only general supervision," *or* "execute under only general supervision special assignments and tasks"?

(4) Do these tasks take up the bulk (80% for non-service employees, 60% for service and retail employees) of the employees' time? 29 C.F.R. § 541.2(a)-(d). If the answer to all four questions is yes, then the long test proceeds to the final question.

Assuming that an employee has met the previous four tests, the fifth requires that the employee "is compensated for his services on a salary or fee basis at a rate of not less than $155 per week . . . exclusive of board, lodging or other facilities." 29 C.F.R. § 541.2(e). The regulations also offer a short test, a safe harbor for employers, which an employee may satisfy even if she fails the long test. The short test exempts any employee who "is compensated on a salary or fee basis at a rate not less than $250 per week" (again exclusive of board, lodging, or other facilities), and who, roughly speaking, meets criteria (1) and (2) above. 29 C.F.R. § 541.2(e)(2). Smith and Nicholson argue that the phrase "*is* compensated" means just that – the employee must be actually paid. (Emphasis

added.) If she is not paid at all, then she is not an administrative employee.

We are mindful of the Supreme Court's admonition that courts closely circumscribe the FLSA's exemptions. "Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the interest of Congress." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493, 65 S.Ct. 807, 808, 89 L.Ed. 1095 (1945). But we are also heedful of the rationale for interpreting the FLSA in this way: "To extend an exemption to other than those plainly and unmistakably *within its terms and spirit* is to abuse the interpretative process and to frustrate the announced will of the people." *Id.* (emphasis added). To read the FLSA blindly, without appreciation for the social goals Congress sought, would also do violence to the FLSA's spirit.

Before turning to the specifics of Nicholson's and Smith's argument, we put the salary test in context.[1] The test dates from an era during which whether an employees [sic] was on salary or was paid by the hour revealed much about his job.[2] Because being on salary indicated a certain status within a company, the regulations adopted the salary test as a rule-of-thumb for sorting out the kinds of employees that Congress intended

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[1] *See generally* Mark J. Ricciardi and Lisa G. Sherman, *Exempt or Not Exempt Under the Administrative Exemption of the FLSA . . . That Is the Question*, 11 LABOR LAWYER 209 (1995)

[2] Garrett R. Krueger, *Straight-time Overtime and Salary Basis: Reform of the Fair Labor Standards Act*, 70 WASH.L.REV. 1097, 1102-03 (1995).

the FLSA to protect from those it did not. We should not be surprised then to learn that the salary floor applies not just to administrative employees, but to executive and professional employees as well. 29 C.F.R. § 541.1, 541.3.

Plaintiffs are not the first exempted employees to try to convert a contract action for unpaid salary into an FLSA suit. And understandably so considerable advantages over a breach of contract claim would accrue if they succeeded. Piercing through insolvent corporations to reach the principals' presumably deep pockets is only the beginning. While the FLSA applies generally to modestly compensated workers, its punitive provisions can escalate the potential recovery to bigger money. Nicholson, for instance, seeks $45,000 on the FLSA claim, plus unpaid overtime; Smith, the smaller sum of $9,372.10, plus unpaid overtime.

We must agree with the reasoning of other courts that have defeated earlier efforts to transform contract actions into FLSA suits. Each of these courts has properly directed its analysis to what an employee was owed, not what he actually received. *Donovan v. Agnew,* 712 F.2d 1509, 1517 (1st Cir.1983); *Reich v. Midwest Body Corp.,* 843 F.Supp. 1249, 1250 (N.D.Ill.1994); *Kawatra v. Gardiner,* 765 S.W.2d 771, 773-76 (Tenn.Ct.App.1988). Support for this position comes first from the regulations themselves. The exemption for administrative employees refers to employees compensated "on a salary or fee basis." 29 C.F.R. § 541.2(e)(1)-(2). The definition of "a salary basis" underscores that it is the employment agreement that is determinative. For an employee to be on a salary basis, it must be that "*under his employment agreement* he regularly receives each pay period . . . a predetermined amount

constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118 (emphasis added); § 541.212 (applying definition to administrative employees). But the regulations are not enough in themselves, for they are somewhat contradictory and opaque. As Nicholson and Smith point out, an administrative employee is one who "is compensated" – a passive verb in the past tense that suggests an action completed, i.e., that the employee has actually been paid.

More decisive is Congressional intent. By focusing on the employment agreement, we respect the protective stance toward poorer and powerless workers that Congress took in the FLSA. President Franklin D. Roosevelt told Congress that the FLSA would " '[ ] extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' " *Phillips*, 324 U.S. at 493, 65 S.Ct. at 808. In light of this goal, one way of illustrating the oddness of Nicholson's and Smith's interpretation is to show how far their logic would run. Administrative employees are not alone in having a salary floor as part of their classification; professional and executive employees do, too. If the plaintiffs' argument prevailed, it would apply to all three classes. Suppose that a company goes bankrupt and fails to pay its non-owner CEO her salary. Under plaintiffs' logic, that CEO could sidestep a contract action and instead invoke the FLSA. By creating the employee exemptions, Congress declined to ground this kind of action in federal labor law. *Donovan*, 712 F.2d at 1517.

Nicholson and Smith cite a series of cases in which reductions in pay led courts to strip the administrative/executive employee defense from employers. *Avery v. City of Talladega*, 24 F.3d 1337 (11th Cir.1994); *Atlanta Professional Firefighters Union, Local 134 v. Atlanta*, 920 F.2d 800 (11th Cir.1991); *Harris v. District of Columbia*, 709 F.Supp. 238 (D.D.C.1989). These cases pertain to a particular situation not present here. As noted above, the regulations state that if an employee is being paid on a salary basis, the employer must not "subject [the salary] to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118. The three cases that plaintiffs cite involve employees alleging precisely this – that their employers have reduced their salaries because of how much or how well they worked. *Avery*, 24 F.3d at 1340-41; *Atlanta Professional Firefighters*, 920 F.2d at 805; *Harris*, 709 F.Supp. at 240, 242. Nicholson and Smith allege nothing of the sort.

Understandably frustrated by their inability to recover in contract, Nicholson and Smith would have us approve an end-run around Congressional intent. We cannot accede to their request.

III. Sundry issues: jury's special verdict and McCullar as an employer

Two issues remain for our consideration. First, we understand Nicholson to be challenging on appeal the jury verdict that he was an administrative employee. To overturn the jury, we would have to find that insufficient

evidence exists to support the jury's determination – drawing all reasonable inferences in favor of the defendants. *Grant v. Preferred Research, Inc.*, 885 F.2d 795, 798 (11th Cir.1989). We cannot so conclude. The jury was told, among other things, that Nicholson located suppliers for import/export trade involving the former Soviet Union, including Ukranian steel producers; that he searched for markets and middlemen in poor countries to sell recycled clothing and jeans there; and that Nicholson enjoyed a fair degree of autonomy and responsibility for complex tasks. Some evidence supports the jury's verdict. We end our inquiry there.

Second, because the jury concluded that Nicholson was an administrative employee, the district court never assessed the validity of another of McCullar's affirmative defenses: that McCullar was not an employer within the meaning of the FLSA. Plaintiffs have again failed on the threshold issue of whether they are administrative employees. This loss renders McCullar's affirmative defense moot.

The judgment of the district court is accordingly

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHARLES E. NICHOLSON AND JOHN W. SMITH, Plaintiffs,	:	CIVIL ACTION NO. 1:93-cv-2328-CC
vs.	:	
WORLD BUSINESS NETWORK, INC., WORLD CHARITIES, INC., WORLD LOTTERY SERVICES, EDWARD M. PEABODY, AND N.D. MCCULLAR, Defendants.	:	

ORDER

Pending before the Court are (1) Defendants' Motion for Summary Judgment as to the Claims of Plaintiff John Smith [22-1], (2) Defendants' Motion for Partial Summary Judgment as to the FLSA Claims of Plaintiff Charles Nicholson [26-1], (3) Defendants Edward Peabody's and N.D. McCullar's Motion for Summary Judgment as to the Claims of Plaintiff John Smith [25-1], (4) Defendant Edward Peabody's Motion for Summary Judgment as to the Claims of Plaintiff Charles Nicholson [23-1], (5) Defendant M.[sic]D. McCullar's Motion for Summary Judgment as to the Claims of Plaintiff Charles Nicholson [24-1], (6) Defendants' Motion to Strike Plaintiff's Reply Brief [39-1], and (7) Motion to Strike [Defendants' Responses to Plaintiffs' Request for Admissions, by Defendant] [41-1].

BACKGROUND

World Business Network, Inc. ("WBN") was incorporated in 1992 to engage in entrepreneurial projects primarily in connection with the former Soviet Union. Edward M. Peabody ("Peabody") was on the Executive Committee of WBN in 1993. N.D. McCullar ("McCullar") became an investor in WBN at the end of March 1993 and began assisting the company at that time. McCullar became President of WBN and advisor to the Executive Committee of WBN on or about May 25, 1993.

World Charities, Inc. ("WCI") is a wholly owned subsidiary of WBN which was created to assist in the formation of a lottery in the former Soviet Union – one of the several entrepreneurial opportunities identified by WBN. Defendant Peabody served as President of WCI from August 1992 until March 1993, and was on the Board of Directors of WCI in 1992-1993. Defendant McCullar was Secretary of WCI from June 1993 until August 1993.

Gil Bachman represented himself as an expert who had extensive experience in lottery operations. Bachman informed WBN he was willing to invest in a partnership to create a lottery in the former Soviet Union. Bachman created a subchapter S corporation, Bachman, Inc., to be the entity serving as a 50% partner in the partnership. WCI served in a similar capacity on behalf of WBN, representing the other 50% partner in the partnership. The partnership was called World Lottery Services ("WLS"). Defendant Peabody served as managing partner of WLS prior to February or March 1993.

John W. Smith ("Smith") previously had worked with Bachman in connection with lottery operations. In November 1992 Bachman recruited Smith to assist him with the lottery which was being started in the former Soviet Union. Between November 1992 and February 1993 Bachman and Smith discussed the possibility of Smith going to Russia in connection with the lottery operations, they discussed that Smith's duties would last five to six weeks, and they discussed Smith's possible compensation. Bachman stated that he would give Smith $2,000.00 per week. Bachman stated that he needed to clear the arrangements with some other people. On February 26, after having performed preliminary duties in the Untied [sic] States for approximately a week and a half, Smith picked up a one way ticket to Moscow. Smith arrived in Moscow on February 27, and was told to take a train to Zaporozha, Russia. Smith stayed in Zaporozha for the period February 28, 1993 through March 20, 1993.

During his stay in Russia, Smith set up a security system, inventoried lottery tickets, assisted getting the lottery tickets and prizes warehoused, inspected operations in Donetsk, Russia, among other things. On approximately March 16 or 17, Bachman travelled to Russia and told Smith that "he was through with him and that he was no longer needed over there."

On October 13, 1993, Smith filed suit claiming that the Defendants did not pay him for the time he spent working on the lottery. Smith alleges that by failing to pay him, all of the Defendants violated the Fair Labor Standards Act ("FLSA"), and WBN, WCI and WLS breached their employment contract with Smith.

Charles E. Nicholson ("Nicholson") also previously had worked with Bachman. In 1993 Nicholson began to take steps to establish a management consulting business. In early February 1993, Nicholson contacted Bachman to see what projects Bachman was involved in and to determine if Bachman had any possible contacts in need of a management consultant. Bachman discussed WLS and asked Nicholson if he would be interested in assisting with recruiting individuals to work for WLS in Russia. Nicholson signed an agreement with Bachman and Peabody, as representatives of WLS, and began performing recruiting services on behalf of WLS.

In approximately May or June 1993 the nature of the services Nicholson performed changed. Nicholson apparently began assisting in some form of sales and trading deals, rather than recruiting. Additionally, at that time Nicholson apparently began performing services for WL Trading, another company in which WBN was a 50% partner. Nicholson's agreement with WLS, however, did not expire until August 1993.

On October 13, 1993, Nicholson filed suit claiming that the Defendants did not pay him for the latter portion of the time he spent working for the Defendant companies. Nicholson alleges that by failing to pay him, all of the Defendants violated the Fair Labor Standards Act ("FLSA") and breached their contract with Nicholson.

DISCUSSION.

(1) *Defendants' Motion for Summary Judgment as to the Claims of Plaintiff John Smith.*

(2) *Defendants' Motion for Partial Summary Judgment as to the FLSA Claims of Plaintiff Charles Nicholson.*

A. Fair Labor Standards Act ("FLSA").

Plaintiffs and Defendants agree that individuals performing services for an employer in a work place within a foreign country are not covered by the FLSA. 29 U.S.C. § 213(f). Thus, with respect of Plaintiff Smith, his recovery under the FLSA would be limited to, at most, two weeks worth of compensation for the preliminary work he performed in connection with the Russian lottery in February 1993 while he was still in the Untied [sic] States.

First, Defendants contend Smith and Nicholson were independent contractors, not employees, and, therefore, Smith and Nicholson are not entitled to compensation under the FLSA. The issue of whether Plaintiffs were employees or independent contractors is a question of law. *See e.g., Patel v. Wargo*, 803 F.2d 632 (11th Cir. 1986); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 471 n. 4 (11th Cir. 1982); *Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185, 1189 n. 11 (5th Cir. 1979).

The definition of employee under the FLSA "is the broadest definition that has ever been included in one act." *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983). Indeed, the definition of employee under the FLSA is broader than the definition under discrimination statutes, ERISA, and common law. The parties agree that what has been termed an "economic realities" or "economic dependence" test governs the determination of whether an individual is an employee, and that five factors are to be

used merely as aids in making the determination of economic dependence. The five factors are: degree of control, opportunities for profit or loss, investment in facilities, permanency of relation, and skill required. The parties disagree on the outcome of the test once the facts of this case are applied.

The central question in determining whether an individual is an employee or an independent contractor under the FLSA is whether the individual is or is not, as a matter of economic fact, in business for himself. Where one works almost exclusively for one employer he is an employee notwithstanding that he exercised prerogatives not customarily possessed by employees such as choosing job assignments and structuring his work patterns. *Donovan v. Tehco, Inc.*, 642 F.2d 141 (5th Cir. 1981).

After applying the facts of this case to the above-referenced test, the Court finds that genuine issues of material fact remain on the issue of whether Plaintiff Smith or Plaintiff Nicholson were employees of independent contractors for the purposes of the FLSA.

Second, Defendants contend that even if Smith and Nicholson were not independent contractors, they were administrative employees and, therefore, exempt from the minimum wage/maximum hour provisions of the FLSA. In order to demonstrate Plaintiffs were administrative employees Defendant bears the burden of demonstrating that Plaintiffs' duties consisted of the performance of office or non-manual work directly related to management policies or general business operations, and that his duties included work requiring the exercise of discretion and independent judgment. Such

exemptions are to be narrowly construed. *Brennan v. Great American Discount & Credit Co.*, 477 F.2d 292 (5th Cir. 1973).

With regard to Plaintiff Smith, the Court finds that Defendants have presented sufficient evidence showing that Smith performed non-manual work directly related to general business operations and that his duties included the exercise of discretion and independent judgment. Plaintiff's argument regarding assembly line inspectors is unavailing. Smith was not an assembly line inspector and he did not rely on "well-established procedure" to perform his work. Moreover, according to Plaintiff's own contentions Smith was to be paid on a salary basis. For these reasons, Defendants' motion as to Smith's FLSA claim is granted.

With regard to Plaintiff Nicholson, the Court finds that if this time Defendants have not met their burden in presenting sufficient evidence showing that from May 1993 through August 11, 1993 Nicholson's duties included work requiring the exercise of discretion and independent judgment. It is undisputed that the nature of Nicholson's job duties changed sometime after April 1993. A genuine issue material fact remains as to Nicholson's precise role in assisting in "deals" and "sales". Defendants' motion as to Nicholson's FLSA claim is denied.

B. Smith's Breach of Contract Claims.

The Court finds Defendants have not sufficiently pierced Plaintiffs' pleadings with respect to Smith's

breach of contract claim against the three Defendant companies. The Court further finds that Plaintiffs' Complaint does not present cause of action for breach of contract as to the individual Defendants.

As a result, Defendants' motion is denied as to the breach of contract causes of action.

(3) *Defendants Edward Peabody's and N.D. McCullar's Motion for Summary Judgment as to the Claims of Plaintiff John Smith.*

Because the Court grants Defendants' [including Peabody and McCullar] Motion for Summary Judgment as to the FLSA claims of Plaintiff John Smith, the Court does not reach the issue of whether Peabody and McCullar are employers, with respect to Smith, as defined by the FLSA. Defendants Peabody's and McCullar's second motion for summary judgment is denied as moot.

(4) *Defendant Edward Peabody's Motion for Summary Judgment as to the Claims of Plaintiff Charles Nicholson.*

(5) *Defendant M.*[sic]*D. McCullar's Motion for Summary Judgment as to the Claims of Plaintiff Charles Nicholson.*

A. FLSA.

Under the FLSA an "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. 203(d). The issue of whether an individual is an "employer" within the meaning of the FLSA is a legal determination; however, such

legal determination must be based on undisputed facts, or a finding of fact. *Patel v. Wargo*, 803 F.2d 632, 634 (11th Cir. 1986).

With respect to Defendant Peabody, the Court finds as follows: Peabody was the Managing Partner of WLS for some time prior to February or March 1993. Peabody was President and a board member of WCI from 1992-1993. Peabody was a member of the Executive Committee of WBN in 1993. Plaintiffs further allege, and have presented some evidence, that Peabody had veto rights over the hiring rights of all WLS employees; Peabody had authority to terminate employees, and Peabody was the director of the Board of Directors of WBN.

With respect to Defendant McCullar the Court finds as follows: McCullar was an investor in WBN at the end of March 1993 and began assisting WBN at that time. McCullar became President of WBN and advisor to the Executive Committee of WBN on or about May 25, 1993. Defendant McCullar was Secretary of WCI from June 1993 until August 1993.

An individual corporate officer is liable under the FLSA as an employer if (1) that officer exerted "operational control" over the company or, (2) if the individual has some direct supervisory responsibility for the employee. *Id.* While a plaintiff retains the ultimate burden of proof on each of his claims, in a motion for summary judgment it is the defendant's burden to show that no genuine issue of material fact remains in dispute.

With respect to both Defendants Peabody and McCullar it appears from Plaintiffs' brief, and the evidence presented by Plaintiff, that Plaintiff contends the

individual Defendants meet the first test referenced above.

The Court finds that issues of material fact remain as to whether, in their various capacities as corporate officers, the individual Defendants exerted operational control over any of the Defendant companies. Although Plaintiff has presented no evidence that Peabody had a *significant* financial interest in any of the Defendant companies, the Court does not find this fact dispositive.

As such, Defendant Edward Peabody's Motion for Summary Judgment as to the Claims of Plaintiff Charles Nicholson is denied with respect to Plaintiff Nicholson's FLSA claim; Defendant M.D. McCullar's Motion for Summary Judgment as to the Claims of Plaintiff Charles Nicholson is denied with respect to Plaintiff Nicholson's FLSA claim.

B. Breach of Contract.

The Court finds that Plaintiff has not presented sufficient evidence to establish that either Peabody or McCullar, in their individual capacities, had contracts with Nicholson. As such, Defendant Edward Peabody's Motion for Summary Judgment as to the Claims of Plaintiff Charles Nicholson is granted with respect to Plaintiff Nicholson's breach of contract claim; Defendant M.D. McCullar's Motion for Summary Judgment as to the Claims of Plaintiff Charles Nicholson is granted with respect to Plaintiff Nicholson's breach of contract claim.

(6) *Defendants' Motion to Strike Plaintiff's Reply Brief.*

Defendants' Motion to Strike Plaintiff's Reply Brief is denied.

(7) *Motion to Strike [Defendants' Responses to Plaintiffs' Request for Admissions, by Defendant].*

Motion to Strike [Defendants' Responses to Plaintiffs' Request for Admissions, by Defendant] is denied.

CONCLUSION

(1) Defendants' Motion for Summary Judgment as to the Claims of Plaintiff John Smith is GRANTED in part and DENIED in part. [22-1] (2) Defendants' Motion for Partial Summary Judgment as to the FLSA Claims of Plaintiff Charles Nicholson is DENIED. [26-1] (3) Defendants Edward Peabody's and N.D. McCullar's Motion for Summary Judgment as to the Claims of Plaintiff John Smith is DENIED as moot. [25-1] (4) Defendant Edward Peabody's Motion for Summary Judgment as to the Claims of Plaintiff Charles Nicholson is GRANTED in part and DENIED in part. [23-1] (5) Defendant M.D. McCullar's Motion for Summary Judgment as to the Claims of plaintiff Charles Nicholson is GRANTED in part and DENIED in part. [24-1] (6) Defendants' Motion to Strike Plaintiff's Reply Brief is DENIED. [39-1] (7) Motion to Strike [Defendants' Responses to Plaintiffs' Request for Admissions, by Defendant] is DENIED. [41-1].

SO ORDERED this 30th day of March, 1995.

/s/ Clarence Cooper
CLARENCE COOPER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHARLES F. NICHOLSON and JOHN W. SMITH,	:	
Plaintiffs	:	CIVIL ACTION
v.	:	FILE
WORLD BUSINESS NETWORK, INC., WORLD CHARITIES, INC. WORLD LOTTERY SERVICES, EDWARD M. PEABODY, and N.D. MCCULLAR,	:	NO. 1:93-CV-2328-WBH
Defendants	:	

ORDER

(Filed Dec. 13, 1995)

Before the Court is plaintiff Charles Nicholson's motion for judgment as a matter of law as to defendants World Business Network, Inc., World Charities, Inc., World Lottery Services, and N.D. McCullar or, in the alternative, for a new trial and for a new trial against defendant Edward M. Peabody [73]. Nicholson contends that the Court erred in allowing the question of whether Nicholson was an exempt administrative employee to go to the jury because the facts of the case rendered Nicholson not an exempt administrative employee as defined in 29 C.F.R. § 541.2 as a matter of law. Nicholson has not asserted any grounds for a new trial against Peabody.

The Court has considered the parties' arguments fully and concludes that neither judgment as a matter of law nor a new trial against any of the defendants is warranted. Accordingly, the Court DENIES plaintiff Nicholson's motion [73].

It is so ORDERED this 12 day of December, 1995.

/s/ Willis B. Hunt, Jr.
Willis B. Hunt, Jr.
Judge, United States
District Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9575

CHARLES E. NICHOLSON,
JOHN W. SMITH,

Plaintiffs-Appellants,

versus

WORLD BUSINESS NETWORK, INC.,
WORLD CHARITIES, INC.,
WORLD LOTTER [sic] SERVICE,
EDWARD M. PEABODY,
N.D. MCCULLAR,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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(Filed May 27, 1997)

BEFORE: ANDERSON and CARNES, Circuit Judges, and CUDAHY*, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant is Denied.

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*Honorable Richard D. Cudahy, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

ENTERED FOR THE COURT:

/s/ Illegible
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHARLES E. NICHOLSON and JOHN W. SMITH, Plaintiffs, v. WORLD BUSINESS NETWORK, INC.; WORLD CHARITIES, INC.; WORLD LOTTERY SERVICES; EDWARD M. PEABODY; N.D. McCULLAR, Defendants.	:	CIVIL ACTION FILE NO. 1:93-CV-2328-WBH

JUDGMENT

(Filed Nov. 16, 1995)

This cause came on for trial before the Honorable Willis B. Hunt, District Judge, and a Jury on October 30, 1995, and the court having submitted issues to the Jury and the Jury having answered as follows:

(1) That Plaintiff Nicholson was an employee of WLS;

(2) That Plaintiff Nicholson was an exempt administrative employee and therefore not subject to the provisions of the Fair Labor Standards Act; and

(3) Under the instructions given, made no determination as to whether Defendants McCullar and Peabody were employers under the Fair Labor Standards Act.

And now, in accordance with the special verdict of the Jury and the opinion of the Court, it is hereby ORDERED, ADJUDGED AND DECREED that judgment be held for the Defendants.

Dated: Nov. 13, 1995.

/s/ Willis B. Hunt, Jr.
United States District Judge